

# Prevailing wage penalties are mandatory

**Pat Devine**  
614.462.2238  
pdevine@szd.com

**Practice Area: Management Representation**

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When the Ohio Department of Commerce determines that there has been an underpayment of prevailing wages on a public improvement, the contractor liable for the underpayment may also be assessed a penalty equal to 100 percent of the amount of the underpayment. The Prevailing Wage Law provides that an employee on a public improvement who is paid less than the prevailing wage amount may recover the difference between the prevailing wage and the amount actually paid to the employee and, in addition, a sum equal to 25 percent of that difference. The liable party shall also pay a penalty to the Director of Commerce of 75 percent of the difference.

In a recent Ohio Supreme Court case, *Bergman v. Monarch Constr. Co.* (2010), 2010-Ohio-622, the issue arose as to whether the penalty is mandatory and

must be imposed when an employee initiated the enforcement action.

In this case, a general contractor entered into a contract with a state university for the construction of student housing. Prevailing wages applied to the project. A subcontractor of the general contractor repeatedly assured the general that it was paying the prevailing wage. The general contractor reviewed the subcontractor's payroll records to confirm the correct prevailing wage rate. Nevertheless, the subcontractor failed to pay the prevailing wage amounts. The Department of Commerce investigated and issued an initial determination that the general contractor and the subcontractor were liable for \$368,266 in back wages and \$368,266 in penalties. This was the first time the general contractor had learned of the problem.

Thirty-six underpaid employees of the subcontractor who had not assigned their claims to the Department of Commerce filed a lawsuit under the Ohio Prevailing Wage Law. A default judgment was entered against the subcontractor. The trial court held the general contractor liable for the back pay but denied the employees' request to penalize the general

contractor for an additional 25 percent of the back wages. The trial court held that the penalty was discretionary, and was not warranted because the general contractor had cooperated in the investigation. For the same reasons, the court also did not impose the 75 percent penalty to be paid to the Director of Commerce. The court of appeals affirmed and the Ohio Supreme Court accepted the case for review.

The Supreme Court recognized that Ohio's Prevailing Wage Law provides to employees a framework of administrative and civil proceedings to ensure an employer's compliance with the law. This framework includes statutory deterrents in the form of civil and criminal penalties.

Where there has been a determination of an underpayment of prevailing wages, an employee has three choices. The employee can initiate an enforcement action, or the employee can assign to the Director of Commerce the right to institute the enforcement action. If the employee chooses to do neither, the Director has an obligation to bring an action within a specified time to collect any amounts owed to the employee and the Director.

COLUMBUS	CLEVELAND	CINCINNATI
ARENA DISTRICT 250 WEST STREET COLUMBUS, OH 43215	USBANK CENTRE 1350 EUCLID AVENUE CLEVELAND, OH 44115	629 OAK STREET CINCINNATI, OH 45206
PH: 614.462.2700 FAX: 614.462.5135 INFO@SZD.COM	PH: 216.621.6501 FAX: 216.621.6502 INFO@SZD.COM	PH: 513.792.0792 FAX: 513.792.0803 INFO@SZD.COM



If the employee does initiate the enforcement action the remedy set forth in the statute includes recovery of the underpaid amount plus a penalty amount equal to 25 percent of the underpayment. According to the Supreme Court's decision, there is no discretion regarding the award of the penalty amount. If the employee proves his or her case, then the statutory penalty follows as a matter of course and is mandatory. This is also true for the 75 percent penalty to be paid to the Director of Commerce whenever the Director determines that there has been a prevailing wage underpayment and the determination becomes final.

There is one exception to the payment of penalties. No penalties will be assessed when the Director of Commerce finds that an underpayment is the result of a misinterpretation of the prevailing wage statutes or an erroneous preparation of the payroll documents and restitution of the underpayment has been made.

For more information, please contact Patrick Devine at 614.462.2238 or [pdevine@szd.com](mailto:pdevine@szd.com); Stephen Smith at 614.462.2249 or [ssmith@szd.com](mailto:ssmith@szd.com); or Philip Hartmann at 614.462.4941 or [phartmann@szd.com](mailto:phartmann@szd.com).